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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 6

LOCAL 167 OF THE INTERNATIONAL BROTHERHOOD OF Teamsters, Chauffeurs, Stablemen & Helpers of America, Carl Firestone, Charles Gershowitz, et al., appellants

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court (R. 49) has not been reported. The court's explanatory comments (R. 82) on the decree which it entered have not been reported. Three opinions by the District Court rendered upon the Government's motions to strike out as sham certain denials in the defendants' answers to the petition are reported,

one in 44 F. (2d) 393 and two in 53 F. (2d) 518. The last of these three opinions is printed in the present record. (R. 25–29.)

JURISDICTION

The decree of the District Court was entered February 6, 1932. (R. 75.) Petition for appeal was filed April 5, 1932, and was allowed the same day. (R. 84, 86.)

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U.S.C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS PRESENTED

Live poultry is shipped to New York City from various western States. This poultry is delivered to commission men, called "receivers", at railroad terminals located in New Jersey and New York City. The receivers immediately sell the poultry at these railroad terminals or at their stands in West Washington Market in Manhattan to wholesalers, called "marketmen", doing business in New York City.

The questions presented are:

(1) Whether defendants' combination restrained interstate commerce. This question turns upon the subsidiary questions (a) whether the combination substantially restrained the sale and delivery of

poultry to certain marketmen from points outside of New York State and (b) whether, when the combination prevented certain marketmen from obtaining poultry from receivers in New York City, the commerce thus restrained was interstate.

(2) Whether the District Court correctly found that the conspiracy continued up to the time of filing suit and that there was a dangerous probability of resumption of illegal activity thereunder.

(3) Whether denial of the conspiracy by those defendants who had previously been convicted of the same conspiracy in a criminal proceeding under the Sherman Act was properly stricken out by the District Court as a sham denial.

(4) Whether the decree properly enjoined certain intrastate acts and conduct and whether there was evidence to justify prohibiting use of union influence to coerce marketmen to buy poultry and poultry supplies from particular sellers.

(5) Whether there is sufficient evidence to connect appellants Markman, Rosenman and Weiner with the conspiracy.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U.S.C., Title 15, Secs. 1, 2, and 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is an appeal from a decree of the United States District Court, entered under Section 4 of the Sherman Antitrust Act, enjoining appellants

(and other defendants who have not joined in the appeal) from conspiring to restrain and monopolize, and from restraining, that part of the interstate commerce in live poultry involved in deliveries and sales to marketmen doing business within the metropolitan area of New York City.

The conspiracy involved in this appeal commenced in May, 1927. The principal conspirators are wholesale poultry dealers, known as marketmen, doing business in the metropolitan area of New York City, and delegates and members of two labor unions operating in the live poultry industry in New York City. The marketmen, who purchase live poultry imported from other States, slaughter this poultry and then sell it to retailers, agreed upon a system of allocating these retail customers among themselves and also agreed to increase the prices they charged retailers. Marketmen and retailers were spied upon and, if they did not comply with the demands of the conspirators, were blacklisted. Blacklisted marketmen were prevented from purchasing live poultry upon its arrival in New York City after shipment thereto in carload lots from other States for immediate sale to marketmen. Physical violence, destruction of property and various forms of intimidation were used in enforcing the conspiracy. Delegates and members of the two defendant labor unions aided in carrying out the conspiracy by refusing to load, transport, handle, deliver, or slaughter live poultry for recalcitrant marketmen. To pay for these en-

forcement activities and to hire men to obstruct those who resisted the conspiracy, an association composed of New York City marketmen attempted to collect, and in large measure did collect, a levy of 1¢ a pound on all poultry sold by marketmen.

Most of the issues involved in this appeal were litigated in an earlier criminal prosecution under the Sherman Act commenced in August, 1928, in the United States District Court for the Southern District of New York against substantially the same defendants as the defendants in the present equity proceeding. (R. 939.) After the jury had returned a verdict of guilty against 66 defendants on November 21, 1929 (Fng.[1] 25, R. 42; Ex. 23, R. 779), the Circuit Court of Appeals affirmed the convictions on January 12, 1931. *Greater New York Live Poultry Chamber of Commerce* v. *United States,* 47 F. (2d) 156, certiorari denied, 283 U.S. 837.

The United States filed its petition in the present cause February 7, 1930, and filed its amended petition April 16, 1930. (R. 1, 126.) The defendants are the Greater New York Live Poultry Chamber of Commerce (hereinafter referred to as the Chamber of Commerce), Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Jobbers and Stablemen of America (hereinafter referred to as Local 167), the Official Orthodox Poultry

[1] The abbreviation "Fng." is used to refer to the District Court's numbered findings of fact.

Slaughterers of America, Inc. (hereinafter referred to as the Shochtim Union), and approximately 100 individuals, 75 of whom are marketmen. (R. 5–8.) The Chamber of Commerce is an association of marketmen doing business in the metropolitan area of New York City. (Fng. 1, R. 34.) Local 167 is a labor union whose members load, handle and truck live poultry in New York City. (Fng. 2, R. 34.) The Shochtim Union is a corporation composed of shochtim (singular shochet), who are the only persons qualified to slaughter poultry in accordance with Jewish dietary laws. (Fng. 3, R. 34.)

The amended petition alleges the same conspiracy, and use of the same means in carrying it out, as had been charged in the prior criminal indictment. (R. 1–16, 939.) After answers had been filed, the District Court, on motion of the Government, struck out as sham the convicted defendants' denial of the conspiracy (including the means used in effecting it), but it did not strike out their denial of continuance of the conspiracy after August, 1928, as alleged in the amended petition. (R. 16–20, 29–30.) *United States* v. *Greater New York Live Poultry Chamber of Commerce,* 53 F. (2d) 518.

At the conclusion of an extended trial,[2] at which 116 witnesses were called, the court delivered an

[2] During the course of the trial decrees were entered by consent against about half of the defendants. (R. 50.)

oral opinion in which it stated that every material allegation of the amended petition had been proved, except that two of the defendants had not been shown to be parties to the conspiracy. (R. 49–50, 63–64, 73.) Some time later the court filed findings of fact and conclusions of law and entered a comprehensive final decree against 52 defendants. (R. 33–48, 75–81.) Only Local 167, the Shochtim Union and 14 individual defendants have appealed from this decree.[3] (R. 84.) Appellants state (brief, p. 1) that all of the individual appellants are members of one or the other of the two appellant unions.

At least 98% of the live poultry sold in the city of New York is shipped from outside the State of New York. (Fng. 5, R. 35.) About 90% of this poultry comes in by freight and the remainder by express or by truck. (R. 361.) Approximately one half of the rail shipments arrive at the Manhattan terminal of the New York Central Railroad and the other half at five railroad terminals in New Jersey. (Fng. 5, R. 35; R. 372–373.)

The poultry is gathered from farms by concentrators who sell it to "shippers." (R. 359.) These shippers put the poultry in specially built railroad cars containing 128 steel cages known as decks, and send it consigned to commission men, called receiv-

[3] No decree was entered against appellant Samuel Silverman (R. 76, 77, 84), who probably was inadvertently named as an appellant. All of the appellants except Morris Markman, Joseph Rosenman and Joseph Weiner were convicted in the criminal case. (R. 84, 779–782.)

ers, generally on straight bills of lading. (R. 360, 361, 366, 373.) Upon arrival at the railroad terminals, the poultry is unloaded, inspected, weighed and placed in coops. (Fng. 5, R. 35; R. 364.) The receivers, about 20 in number, sell the poultry to marketmen, from 60% to 80% being sold directly from the freight cars at the terminals and the remainder being sold at the stands which the receivers maintain at West Washington Market in Manhattan adjoining the Hudson River. (Fng. 5, R. 35–36; R. 360.) Since poultry is a highly perishable commodity, most of it is sold on the day of unloading, and about 50% of the poultry is ordered by marketmen, subject to inspection, either while the cars are in transit or before the poultry is unloaded. (Fng. 5, R. 35; R. 378.) The marketmen, after purchasing poultry, have it loaded on trucks, either at the railroad terminals or at West Washington Market, and transported to their places of business. (Fng. 5, R. 36.) The poultry remains in the coops in which it is placed at the terminals until it arrives at the marketmen's places of business and the shipper pays for the rental of these coops. (R. 363, 370, 375.)

Normally the shipper receives the market price (established by sales to marketmen) on the day of unloading. (R. 362, 366–367, 377–378.) When a receiver, after having sold a shipment of poultry, discovers that others have sold at a higher price on that day, he will try to remit his own sales price, but he may remit the higher price if the shipper's

business is substantial and if the shipper demands this higher price. (R. 372.) Sometimes the shipper demands and the receiver agrees to pay a premium above the market price for desirable grades of poultry which command a higher price than ordinary poultry. (R. 363.) The receiver, in remitting to the shipper on the basis of these various price arrangements, deducts therefrom the charges for freight, unloading at the terminal, coopage, cartage to West Washington Market, and a commission ranging from 3% to 5%. (Fng. 5, R. 36; R. 363.)

The receivers handle from 80% to 98% of the poultry on a commission basis, as just outlined; they purchase the remainder outright at a flat price, which is agreed upon prior to delivery of the poultry. (R. 368, 370.) In handling "commission" poultry, the receiver acts as a bank and collection agency for the shipper, keeps him fully advised as to market conditions, and obeys the shipper's instructions as to time of unloading and as to price. (Fng. 5, R. 36; R. 371, 379.)

The work of loading coops on trucks at the New York Central terminal and at West Washington Market, of hauling coops from the New York Central terminal and from West Washington Market to the marketmen's places of business, and of hauling coops from the New York Central terminal to West Washington Market, is done by members of Local 167. (Fng. 2, R. 34.) The poultry is

slaughtered by shochtim in the employ of marketmen. (Fng. 3, R. 34.)

We now turn to a statement of the conspiracy and of its effect upon interstate commerce in live poultry. Shortly after Benjamin Simon became Supervisor of the Chamber of Commerce in May, 1927, he called a meeting of the board of directors of the Chamber and told them that he wanted $5,000 a week and suggested that this be raised by a levy of 1¢ per pound on all poultry sold by marketmen. (Fng. 7, R. 36.) Simon appointed collectors, who for the most part were directors of the Chamber, for each district in the metropolitan area, namely, Bronx, Harlem, East Side, Williamsburg, Borough Park, and Brownsville. (Fng. 9, R. 38.) The collectors called meetings of marketmen in their respective districts and told the marketmen that they would have to contribute 1¢ per pound on all poultry which they sold. (Fng. 10, R. 38.) The marketmen allocated the poultry dealers and butchers among themselves and agreed not to sell to customers allocated to others, arbitration committees being appointed to allocate disputed customers. (*Ibid.*) The collectors were frequently accompanied by bookkeepers, who examined the books to see how much poultry had been sold and who the customers were. (R. 143, 180, 205, 249, 297.)

Only a portion of the total collections, which amounted to about $1,000,000 the first year, was

paid to Simon.[4] (Fng. 13, R. 39.) It was agreed that the money collected was to be used to maintain and enforce the system of allocating customers among marketmen by hiring men for the purpose of spying upon, reporting, threatening and obstructing marketmen and retailers who did not abide by the allocation agreement; to prevent recalcitrant marketmen from obtaining poultry from any source whatever; to bribe public officials charged with the enforcement of the antitrust laws; and to make payments to certain of the small marketmen and poultry dealers who were doing both a wholesale and retail business, in return for their agreement not to sell wholesale. (Fng. 8, R. 37.)

At various organization meetings of marketmen David Hirshon, the president of the Chamber of Commerce (R. 271), told the marketmen that the 1¢ per pound collections would be used to hire men to see that customers bought poultry where they were supposed to buy; that if any customer left the market to which he was allocated, these men would bring him back; that anyone who did not pay 1¢ a pound would have his poultry stopped; that "gangsters" were going to be used to make the marketmen do as they were told; and intimated that there was an agreement with the unions to

[4] On the East Side collections aggregated $2,100 to $3,200 per week, of which $1,030 was paid to Simon; in the Bronx they aggregated $2,000 to $2,500 per week, of which $900 to $1,000 was paid to Simon. (Fng. 12, R. 38–39.)

make retailers take additional employees if they sold wholesale. (R. 297, 538, 539.)

The marketmen were told to advance their prices, and were occasionally told by leaders of the respective districts what price to charge. (Fng. 11, R. 38.) Although prior to June, 1927, the marketmen had charged 3¢ or 4¢ a pound more than they paid receivers, after that time they concertedly charged from 6¢ to as much as 18¢ a pound more than they paid receivers.[5] (*Ibid.*)

Marketmen who sold to poultry dealers and butchers not allocated to them, or who refused to pay the 1¢ a pound, were prevented from buying and loading poultry at West Washington Market (R. 132–133, 136, 225, 244–246, 291–292, 307–308, 326, 335, 349, 352, 387, 402–403, 538–540, 579, 647, 651; Ex. A, R. 829, 832); at the New York Central Terminal (R. 243, 303, 350–352, 418, 422, 539–540); at the railroad terminals in New Jersey (R. 133, 135, 291, 303, 325, 327, 352, 401, 421, 539–540); in Newark and Elizabeth, New Jersey (R. 190, 422, 429–430, 471); in Philadelphia (R. 177, 189, 426,

[5] Shipments of live poultry to the New York market average about 200 cars a week, or 10,400 cars a year, and a carload weighs about 18,000 pounds. (R. 373, 691.) Annual receipts of live poultry therefore approximate 187,000,000 pounds. If the marketmen's price advances averaged 6¢ a pound, this increased the retailers' costs by more than $11,000,000 a year; if these price advances averaged only 3¢ a pound, retailers' costs were increased by over $5,500,000 a year. These higher costs would, in the ordinary course, be passed on to the consuming public.

445, 653; Ex. A, R. 832), and other places outside New York (R. 190–191, 311–312; Ex. A, R. 832–835).

New Jersey marketmen who supplied New York retailers and butchers were blacklisted and prevented from purchasing poultry in West Washington Market (R. 132–133, 465), and at the New Jersey railroad terminals (R. 133–135, 465).

The following are examples of threats made to recalcitrant marketmen and to retailers who did not buy exclusively from the marketmen to whom they were assigned:

"I am going to give you a bullet in the heart" (R. 489);

"I am going to beat you up" (R. 232);

"I am going to blow your brains out" (R. 273);

"We are going to kill you" (R. 407).

In many instances there was actual violence. Recalcitrant marketmen and retailers or their employees were beaten (R. 193, 215, 306, 401–402, 541), or the tires of their trucks were cut (R. 215, 307, 407), or emery placed in the motor (R. 273, 277), and on one occasion a truck was stolen and practically demolished [6] (R. 193). On another occasion a recalcitrant retailer's home was bombed immediately after he had been threatened by the president of the Chamber of Commerce. (R. 487–489.)

[6] Exhibits 18, 19, and 20 are photographs showing some of the damage to this truck. (R. 193–194, 760–762.)

Memoranda of the weekly receipts and disbursements of the collector on the East Side were introduced in evidence. (R. 207; Ex. 21, R. 763.) The memoranda, read in the light of the testimony of this collector, show weekly payments of $15 or $25 to appellant Max Keslin, an official of Local 167, and weekly payments ranging from $100 to $455 to the Shochtim Union or its officials. (R. 209, 210; Ex. 21, R. 763–777.) There was also testimony that each district paid the president of the Shochtim Union $75 a week. (R. 7, 145–146.) Albert Winkel, president of the Chamber of Commerce until August, 1927, testified that while he was president appellants Charles Herbert and Joseph Weiner, delegates of the Shochtim Union (Fng. 3, R. 34), were on the pay roll of the Chamber for two or three weeks during the summer of 1927 at $75 a week, with no duties to perform. (R. 152.) A witness saw a collector in the Brownsville district pay $75 to appellant Carl Firestone, one of those whom the District Court found employed threats and violence to compel adherence to the allocation agreement. (Fng. 23, R. 41; R. 306.)

The union delegates were active in suppressing price cutting and in preventing sales and deliveries to retailers not allocated to particular marketmen. (R. 325, 345, 349, 497, 567.) They visited price-cutters, told them what prices to charge, erased their low-price signs, threatened them with violence

and sent back spies to see if their instructions were being opposed. (R. 272–273, 400–401.) Marketmen under suspicion were watched by other marketmen and union members jointly. (R. 305–306.) Shochtim were instructed by the delegates not to slaughter for "strange butchers". (R. 305, 325, 335, 345, 348–349, 497, 500, 540.) Marketmen who resisted the conspiracy were required by union delegates to employ an excessive number of laborers or slaughtering was interrupted upon the pretext of a violation of union regulations. (R. 301, 311, 322, 327, 349, 350, 352, 401, 539.) On some occasions marketmen who refused to abide by the conspiracy were required to take union men, who were instructed to do as much damage and as little work as possible. (Fng. 20, R. 40.) When blacklisted marketmen attempted to obtain poultry from Philadelphia and other distant points, they were threatened with violence by union delegates and other marketmen. (Fng. 21, R. 40.) The president of the Chamber of Commerce accompanied a delegate of Local 167 to Philadelphia and ordered a poultry commission man there not to ship to New York marketmen without the union's consent. (*Ibid.*)

Concerning the relation of the unions to the conspiracy, the District Court said in its opinion (R. 55):

> Gentlemen, there is one feature of this case which is fatal, as I conceive it, to any con-

tention that there was not a conspiracy or that the unions did not share in the great responsibility for it; and that feature is the concurrence, shown by the proof so frequently of the enforcement by the unions of their rules whenever marketmen or butchers became recalcitrant. That feature is astounding. * * *

SUMMARY OF ARGUMENT

I. Defendants' combination to interfere with the sale and delivery of live poultry to marketmen who do not comply with the demands of the conspirators is a combination in restraint of interstate commerce. At least 98% of the poultry purchased by marketmen doing business in the metropolitan area of New York City is shipped to this area from outside of New York State. The combination restrained interstate commerce in two ways, first, by interfering with the sale and transportation of poultry from one State to another and, second, by preventing recalcitrant marketmen from obtaining poultry from receivers in New York City before interstate transportation of the poultry had come to an end.

The defendants, as a part of their combination, intended to prevent recalcitrant marketmen from obtaining poultry from any source. Interference with the sale and transportation of poultry from one State to another was within the scope of the conspiracy and there were numerous instances of

restraint of such interstate commerce. The commerce thus restrained was substantial; New York City marketmen purchase a large percentage of their poultry at the New Jersey terminals. Under these circumstances the doctrine of *de minimis,* upon which appellants rely, is wholly inapplicable.

The defendants also interfered with interstate commerce by preventing recalcitrant marketmen from obtaining poultry from receivers at the New York Central terminal and at the receivers' stands in West Washington Market. Appellants do not deny that defendants combined to restrain this commerce, but they contend that it is not interstate. We submit that the interstate movement of poultry shipped to New York City from other States does not come to an end until sale and delivery to marketmen. The movement is certainly not broken when the poultry is loaded on the marketmen's trucks at the railroad terminal. The movement is also not broken when, in the process of finding a purchaser, the coops in which the poultry is placed at the New York Central terminal are first taken to the receivers' stands and are there sold, generally on the day of unloading, to marketmen. Receivers are merely a conduit through which flows the daily stream of commerce from shippers to marketmen.

II. The District Court found that the conspiracy continued in existence before and after suit was filed and that there was a continuous and dangerous probability of resumption of the means and meth-

ods employed in carrying it out. Since the objectives of the combination contemplated and required future as well as present restraint of trade, injunctive relief should be refused only if the defendants showed that the conspiracy had been abandoned. We submit that not only was abandonment not established, but that there is affirmative evidence that the conspiracy, although partially dormant, continued in existence.

After August, 1928, when a criminal proceeding under the Sherman Act was started against substantially the same defendants, several new organizations of marketmen were formed with purposes and activities similar to those employed by the conspirators prior to August, 1928. After August, 1928, there were numerous instances of restraint of trade of the same type, and enforced by the same means and by the same parties, as disclosed in the trial of the criminal case. Defendants' failure to testify, when the facts were peculiarly within their knowledge, creates a strong inference against them.

An intent to restrain interstate commerce being shown, a dangerous probability of future acts in restraint of trade is enough to justify equitable relief. The Sherman Act directs itself against that dangerous probability as well as against the completed result. *Bedford Cut Stone Co.* v. *Stone Cutters' Association,* 274 U.S. 37, 55.

III. Since certain of the defendants in the present equity case had been previously convicted in a

criminal proceeding under the Sherman Act charging the same conspiracy, the District Court properly struck out as sham that part of the answers of the convicted defendants which denied this conspiracy. Adjudicated questions cannot be relitigated in a subsequent suit between the same parties. The doctrine of *res judicata* applies to a criminal conviction. The primary purpose of pleadings being to define and narrow the issues before trial, pleadings which do not perform this function may be stricken out. The District Court, by looking at its own records, ascertained that certain defendants had been found guilty of the conspiracy charged in the present suit. Denial of this adjudicated fact was a sham and the court had power to eliminate this false issue.

In any event the convicted defendants were not prejudiced by the action of the District Court. The conspiracy was independently established and no evidence offered by any defendant was excluded as being barred by the court's ruling on the Government's motion to strike.

IV. The prohibitions of the decree are properly not limited to acts done in the course of interstate commerce. The evidence also justifies the provisions of the decree prohibiting coercion by the defendant unions to compel marketmen to buy poultry and poultry supplies from particular sellers.

V. There is sufficient evidence to connect appellants Morris Markman, Joseph Roseman, and Joseph Weiner with the conspiracy.

ARGUMENT

I

DEFENDANTS' COMBINATION TO PREVENT THE SALE AND DELIVERY OF LIVE POULTRY TO RECALCITRANT MARKETMEN IS A CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE

When New York City marketmen purchase poultry at the New Jersey terminals, this is a purchase in interstate commerce, contemplating immediate transportation of the poultry from New Jersey to New York. The sale and delivery of poultry to marketmen from points outside New York State, other than the New Jersey terminals, is likewise an interstate transaction. We contend that the commerce involved in purchases by marketmen at the New Jersey terminals and other places outside New York is substantial and that the conspiracy embraced restraint of such commerce and did restrain it.

Defendants' combination also prevented recalcitrant marketmen from obtaining poultry from receivers at the New York Central terminal and at West Washington Market. We shall later urge that live poultry shipped to New York City from other States remains in interstate commerce until sold and delivered to the marketmen and that when the combination laid the heavy hand of restraint upon the free interchange of poultry from receivers to marketmen within the limits of New York City, the commerce restrained was interstate.

Since New York marketmen purchase approximately one third of all their poultry at the New Jersey terminals, the extent and importance of the commerce involved in purchases outside of New York State can hardly be questioned. About 37½% of all the live poultry shipped by rail to the New York market is disposed of at the New Jersey terminals, principally to New York marketmen.[7] (R. 365.) Appellants concede (brief, p. 9) that 37½% of the poultry shipped by freight to the New York market "is loaded on the trucks of marketmen at the New Jersey terminals" and that New York marketmen purchase the "majority" of this 37½%.

When New York marketmen buy poultry at the New Jersey terminals the poultry is sometimes loaded on their trucks at the terminals. (R. 379.) On other occasions poultry ordered at the New Jersey terminals is brought to West Washington Market by a trucking company employed by the receivers and then transferred in the street or elsewhere from the trucks of this company to the marketmen's trucks, but in that event the poultry is not considered sold until loaded on the marketmen's trucks. (*Ibid.*) We submit that the purchase is an interstate transaction whether delivery is made in New Jersey or New York. When the purchase is completed in New Jersey, the buyer acquires the

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[7]About 90% of the receipts at New Jersey terminals is sold to New York marketmen. (R. 373.)

poultry for the purpose of immediately transporting it to New York. Interstate commerce includes the buying and selling of goods for shipment to another State where such shipment is the regular course of business. *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 54–55. When poultry is ordered in New Jersey for delivery in New York, this calls for an interstate movement of the goods and directly involves interstate commerce.

Since, then, the marketmen's purchases at New Jersey terminals are substantial and interstate, the only remaining question in this connection is whether interference with this commerce is within the scope of the conspiracy. The District Court in its opinion pointed out that if defendants' combination had not included restraint upon the purchase of poultry at the New Jersey terminals and at other cities outside of New York State "the scheme as it was designed, and as was proved in this case, would have been wholly ineffective" and that defendants' interference with this commerce "was not merely incidental". (R. 53.) The president of the Chamber of Commerce told a blacklisted marketman, "As quick as you can find a place where to load poultry, that is how quick we will find a place where to stop it." (R. 311.)

The District Court found that defendants combined to prevent recalcitrant marketmen from obtaining poultry at the New Jersey terminals and at other places outside New York and that this plan

was carried out. (Fngs. 8, 15, 17, 21; R. 37, 39–40.) The evidence amply supports these findings. On repeated occasions the defendants directly interfered with the purchase of poultry by marketmen at the New Jersey terminals. (R. 133, 135, 291, 303, 325, 352, 401–402.) When blacklisted marketmen, cut off from their ordinary sources of supply, attempted to obtain poultry from other cities, such as Philadelphia, Newark, N.J., Elizabeth, N.J., and Lincoln, Neb., threats and other coercive tactics were successfully employed to block these purchases. (R. 177, 189–190, 422, 426, 429–430, 445–447, 471, 652–653; Ex. A, R. 832–835, 838–840.) When New York retailers attempted to buy from New Jersey marketmen because of the high prices charged by New York marketmen, the defendants interfered with such purchases, and they also prevented New Jersey marketmen who sold to such retailers from purchasing poultry in West Washington Market. (R. 132–133, 380–381, 465, 525, 564–565, 570.)

Appellants have undertaken to summarize (brief, pp. 28–31) all of the evidence relating to restraints (other than those involved in purchases by New York marketmen at the New York Central terminal or at West Washington Market). We shall not review all the evidence for the purpose of showing omissions or understatements in appellants' summary, but, by way of illustration, we shall set forth the evidence relating to restraints upon Mack Harnett's purchases of poultry in other States. We

also suggest comparison between appellants' summary (brief, p. 31) of the restraints imposed upon Aaron Steinberg with the District Court's Finding 29 (R. 44).

While Harnett was blacklisted, the receivers refused to sell him poultry, not only at West Washington Market, but also at the New Jersey terminals, although he did not owe the receivers any money and had regularly purchased poultry from them before that time. (R. 302–303.) When he went with his own truck to get poultry in other States (R. 303), he was trailed on several occasions—by defendants Rosenstein and Kaufman (business representative of Local 167), by a brother of defendant Firestone, and by defendant Arthur Herbert (delegate of Local 167). (R. 305, 308.) When a Philadelphia commission man sent a truck load of poultry to New York, part of which was for Harnett, defendant Keslin met the truck driver at West Washington Market and told the driver that he had men waiting at the Williamsburg bridge to stop the truck and destroy the load. (R. 652–653.) A little later three or four cars drove up with defendants Charles Herbert, Arthur Herbert, and others and the driver was told that if he did not return to Philadelphia they would throw the load of poultry in the river. (R. 653.) These threats were effective; the driver took the poultry back to Philadelphia. (*Ibid.*)

Appellants state (brief, p. 30) that Harnett "was engaged in a labor controversy at the time." They

fail to mention that union delegates ordered his employees out the day after he had been warned by the president of the Chamber of Commerce not to sell to strange customers; that union delegates also told Harnett not to sell to strange customers; that he was able to obtain poultry as soon as he agreed with the Chamber of Commerce not to do a wholesale business. (R. 301–302, 305, 307, 308.)

Since the defendants intended to prevent recalcitrant marketmen from obtaining poultry in other States and since the commerce thus restrained was substantial, the doctrine of *de minimis* as illustrated in *Industrial Association* v. *United States*, 268 U.S. 64, upon which appellants rely, is wholly inapplicable. That case was a proceeding under the Sherman Act involving a combination by building contractors and dealers in building materials to establish the open shop in the building industry in San Francisco, by requiring builders who desired building materials of certain kinds to obtain permits from a Builders Exchange, and by refusing such permits to those who did not maintain an open shop. This Court found (p. 77) that interference with interstate trade "was neither desired nor intended" and that "to this end, the selection of materials subject to the permit system was substantially confined to California production." The Court further found (p. 84) that direct interference with interstate sales and shipments was limited to "some three or four sporadic and doubtful instances, during a period of nearly two years",

involving material of negligible value. The Court therefore said that the weight of these instances, as evidence to establish a conspiracy to restrain interstate commerce or to establish such restraint in fact, "becomes so insignificant as to call for the application of the maxim, *de minimis non curat lex.*"

Even if the evidence of actual restraint upon purchases outside of New York were far less convincing than it is, the very infrequency of the overt acts of restraint might merely attest the success of the conspiracy. Under the Sherman Act no showing of specific overt acts is necessary. In *Nash* v. *United States*, 229 U.S. 373, 378, this Court said that "the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."

In the criminal case [8] the Circuit Court of Appeals said (p. 159):

> * * * it is urged that the evidence of interferences in New Jersey should be disregarded on the principle of de minimis, as illustrated in the Industrial Association Case. With this contention we do not agree. The number of instances does not limit the inference to be drawn from them, and the jury might well have concluded that the plan

[8] *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156, *supra.*

involved New Jersey deliveries as well as those in New York. Indeed, it would have to do so in order to be effective against recalcitrant New York marketmen. Nor were the New Jersey deliveries so small a part of the whole as to fall within the de minimis principle.

But the interstate commerce restrained by defendants' combination is not limited to that involved where poultry is sold for immediate transportation or delivery in another State. The combination also prevented New York marketmen from purchasing poultry from receivers at the New York Central terminal and at West Washington Market.[9] We submit that the commerce thus restrained is interstate, that live poultry shipped to New York City moves in interstate commerce until sold and delivered to marketmen.

Poultry is shipped from various western States consigned to New York receivers, about 200 cars arriving each week (R. 373). When such a shipment is made, the receiver immediately attempts to find a purchaser among the marketmen. (R. 369–370.) He takes orders for about half the poultry, subject to inspection, either while the car is in transit or before it is unloaded. (Fng. 5, R. 36; R. 372.) Of the poultry arriving at the New York Central terminal, from 60% to 65% is loaded on

[9] Appellants do not deny that the combination interfered with such purchases; their defense is that the commerce thus affected is intrastate.

the purchasing marketmen's trucks at the terminal. (R. 373.) The receiver sells the poultry, which is highly perishable, as rapidly as possible and most of it is sold on the day of unloading.[10] (Fng. 5, R. 35; R. 378.) The receiver is "practically a bank for the shipper and a collection agency", and the receiver advises the shipper daily concerning market conditions. (R. 371.) The shipper may dictate the price at which the poultry shall be sold. (Fng. 5, R. 36.) Irrespective of whether or not the shipper retains legal title, his interest in the poultry does not cease when it comes into the custody of the receiver, and the price which the shipper receives depends upon the market price established by sale to marketmen. In the criminal case the Circuit Court of Appeals, with the same evidence before it (R. 52, 359, 369), said:[11]

> It was clearly contemplated by the shippers that the poultry should pass through the receivers to the marketmen, for the shippers paid the charges for unloading, cooping and cartage to West Washington Market, and the price paid the shippers depended on market price made by resale to the marketmen.

The receivers thus serve as mere intermediaries between shippers and marketmen; they are a con-

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[10] We question appellants' statement (brief, pp. 22, 27) that poultry is often kept by receivers for as long as two weeks. The testimony upon which it rests is, "We have it sometimes a week or two." (R. 364.)

[11] *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156, 158, *supra*.

duit through which flows the daily stream of commerce from shippers to marketmen. When poultry is loaded on the marketman's truck at the New York Central terminal, the flow of poultry from shippers to marketmen is clearly unbroken and continuous. Unloading, inspection, weighing and sale of the poultry at the terminal are services incidentally performed to promote the regular and steady movement of live poultry from shippers to marketmen. It follows that a combination, such as this one, which interposes barriers to the free flow of this commerce, by arbitrarily obstructing sales and deliveries to marketmen at the railroad terminal in New York, is a combination in restraint of interstate commerce.

We also submit that the interstate character of the shipment is not changed where, in the process of finding a purchaser among the marketmen, poultry is trucked to the receivers' stands in West Washington Market and there sold. These stands are in every way analogous to stockyards through the medium of which buyers are found for livestock shipped to the stockyards from other States. This Court has held that sales on such stockyards are sales in interstate commerce and that the stockyards and the commission men who make the sales are instrumentalities of such commerce.

In *Swift & Co.* v. *United States,* 196 U.S. 375, the defendant meat packers were charged with conspiring to restrain and monopolize interstate commerce by, *inter alia,* agreeing not to bid against

each other in the purchase of livestock at certain stockyards. This Court, in rejecting the contention that interstate commerce was not affected by this agreement, said (pp. 398–399):

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

In *Stafford* v. *Wallace,* 258 U.S. 495, the provisions of the Packers and Stockyards Act authorizing the Secretary of Agriculture to prescribe rules and regulations governing practices and charges on the large stockyards of the country were sustained as a valid exercise of the power of Congress to regulate interstate commerce. The Court said (pp. 515–516):

> The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transac-

> tions which occur therein are only incident to this current from the West to the East, and from one state to another.

We submit that the two foregoing cases do not turn, as appellants contend (brief, pp. 25–26), upon the fact that livestock, after sale at the stockyards, is ordinarily either reshipped to another State or turned into meat products which are transported to another State. In the *Swift* case this Court said (p. 400) that the prohibitions of the decree should be confined to livestock which "is sent from other States to the stockyards for sale *or* is bought at those yards for transport to another State". (Italics ours.) In other words, if the cattle have been shipped from another State, this is sufficient to establish the interstate character of the stockyards sale.[12]

Binderup v. *Pathe Exchange, Inc.*, 263 U.S. 291, *supra*, indicates that the interstate character of the movement from western shippers to New York marketmen is not broken by an intermediate delivery of the poultry at the receivers' stands in West Washington Market. That case held (see p. 309) that when New York distributors leased motion picture films to a Nebraska exhibitor and sent the

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[12] The circumstances under which this Court has relied upon (*Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 310–311) and distinguished (*Industrial Association* v. *United States*, 268 U.S. 64, 79, *supra*) the two stockyards cases show that the interstate movement of livestock, after sale and purchase at the stockyards, is not a controlling factor in the decision of these cases.

films to their Nebraska agency to be held by it for delivery to various Nebraska exhibitors, delivery of the films to the local agency did not end the interstate movement, but that by this delivery the movement of the commodity "was merely halted as a convenient step in the process of getting it to its final destination."

Peoples Natural Gas Co. v. *Public Service Commission,* 270 U.S. 550, shows that where, as here, there is continuity of movement of a perishable commodity from one State to a purchaser in another, interstate transportation is not arrested by an intervening change in custody and title. One of the questions presented in that case was whether West Virginia natural gas which a Pennsylvania company purchased at the Pennsylvania-West Virginia boundary line and which was thereafter mingled with Pennsylvania gas was moving in interstate commerce when sold in Pennsylvania to another company supplying consumers in that State. This Court said (p. 554):

> As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one State to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of cus-

tody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business.

Even if we assume, as appellants contend, that the receivers purchase all poultry consigned to them, including "commission" poultry, the transfer of legal title is a minor incident facilitating the movement from shippers to marketmen and does not end the interstate journey. As this Court has said, "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (*Swift & Co.* v. *United States, supra,* p. 398), and its character is determined by "practice, intent and the typical course, not title or niceties of form" (*Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105, 113).

Furthermore, we submit that the receivers do not purchase "commission" poultry (representing from 80% to 98% of the whole, *supra,* p. 10), but handle it as *del credere* commission agents. The receiver is paid a commission for his services, the shipper bears certain important expenses after the poultry passes into the receiver's hands, the shipper may control the time and terms of sale, and the receiver supplies the shipper with daily information as to market conditions (*supra,* p. 10); all these facts indicate the agency nature of the relationship. If the receiver acts as the shipper's agent, sales to marketmen are clearly made in the

course of interstate commerce. *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, *supra*.

Industrial Association v. *United States*, 268 U.S. 64, *supra*, upon which appellants rely, does not support their contention that interstate commerce ends when poultry arrives at the New York Central terminal or at West Washington Market. That case held that plaster shipped into California from other States to local representatives of the manufacturers or to independent local dealers, and brought to rest in warehouses and salesrooms and commingled in these warehouses and salesrooms "with the common mass of local property," is not moving in interstate commerce when subsequently sold to California purchasers as the result of new and independent arrangements not connected with the original shipment into California. This decision is clearly not applicable to the facts of the present case. We are here concerned with a rapid and ever renewing flow of a perishable commodity through the hands of the receivers; immediate sale to marketmen is directly related to and the intended sequel of the interstate shipments; and, as the Circuit Court of Appeals said in the criminal case,[13] "the receivers did not warehouse the poultry or commingle it with local goods before disposing of it."

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[13] *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156, 158, *supra*.

II

THE CONSPIRACY WAS NOT ABANDONED BEFORE SUIT WAS FILED AND THE CONTINUOUS AND DANGEROUS PROBABILITY OF RESUMPTION OF ILLEGAL ACTIVITY THEREUNDER JUSTIFIED EQUITABLE RELIEF

The District Court which heard the testimony found that the conspiracy continued in existence up to the time of filing the amended petition in April, 1930, and for at least eleven months thereafter. (Fng. 27, R. 43.) It also found that up to the time of trial there had been a continuous and dangerous probability of resumption of the means and methods employed in carrying out the conspiracy. (Fng. 39, R. 47.) In its opinion the District Court, after stating that there had been numerous interferences with trade since 1928 and that these had been of the same type and had been enforced by the same means as those disclosed in the criminal trial, said (R. 62):

> At best, I think it can only be said that the conspirators are temporarily under cover or that the conspiracy is temporarily smoldering. That is enough in itself to afford basis for an injunction.

Upon the question of continuance of the conspiracy after August, 1928, the court also said (R. 58):

> There is ample evidence here from which it can be inferred, even though the misconduct of defendants had been sporadic only, that it was animated by the same purposes and

that it arose from or was in furtherance of the same conspiracy that had already been condemned in the criminal case.

Defendants' combination did not have as its objective merely the doing of certain specified acts, but it contemplated and required future as well as present restraint of trade. A conspiracy of this kind having continuity of purpose, once it is established, must be regarded as continuing until abandonment, and abandonment or disavowal must be affirmatively shown. *Hyde* v. *United States,* 225 U.S. 347, 369; *Nyquist* v. *United States,* 2 F. (2d) 504, 505 (C.C.A. 6th), certiorari denied, 267 U.S. 606. Such an affirmative showing of abandonment is particularly required where, as here, there have been recurrent combinations of a like character over a period of several years (*infra,* pp. 43–44).

Abandonment certainly cannot be predicated solely upon the criminal convictions. The weight of this circumstance as evidence of abandonment is to be viewed in the light of the character of the defendants and of the sentences imposed, and other factors. As the District Court observed, the sentences were "lenient" and this leniency was "misinterpreted"; in short, "the results of the criminal trial taught the defendants nothing ". (R. 59, 60.)

Although appellants in their answers formally denied continuance of the conspiracy after August, 1928, they did not themselves take the stand to support these denials by their sworn testimony. Cer-

tain evidence relating to restraints occurring after August, 1928, was open to more than one interpretation. For example, the purchase, sale and delivery of poultry in interstate commerce were interfered with after August, 1928, by the same means and by the same parties as those involved in like restraints prior to that time, but in most of these later restraints there was also evidence of a labor dispute. The defendants were charged with using, and were found to have used, the pretext of labor disputes in furtherance of the conspiracy. (R. 14–15, 55.) In the face of such evidence and such charges the defendants, although they participated actively in the trial and were advised by skilful counsel (R. 58), failed to take the stand to explain their equivocal conduct or to deny continuance of the conspiracy. Under similar circumstances this Court said of a failure to testify, "Silence is often evidence of the most persuasive character." *Bilokumsky* v. *Tod,* 263 U.S. 149, 153–154. See also *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 52–53.

We submit that the District Court properly attached importance to defendants' silence. It said (R. 58):

> The facts were peculiarly within the knowledge of the defendants, who listened as humble people poured into my ears from day to day details of the oppression they had suffered. These witnesses charged the defendants by testimony given from the stand, charged into the very ears of the de-

> fendants as they sat in this court; and yet, the defendants remained mute.
>
> The inevitable inference, under the circumstances, is that if the defendants had taken the stand, they would have been compelled to admit that they were still engaged in the conspiracy which had already been established by the jury verdict.

We turn to the facts relied upon as affirmatively showing continuance of the conspiracy and threat of further illegal activity thereunder. In June, 1929, the defendant marketmen of the East Side organized the L. W. Credit Association for the purpose of restricting competitive sales, allocating retailers among themselves, raising prices, and restraining competition in the sale of live poultry. The association [14] placed "watchers" in the markets of the East Side who, in pursuance of the plan to allocate customers and advance prices, recorded the weight of the poultry sold by the several marketmen and transmitted these reports to the association. Each marketman was allotted a specific weekly quota of sales. He was required to pay the association 4¢ a pound for each pound of poultry sold in excess of his quota and was entitled to receive from the association 4¢ a pound if his sales were less than his quota. Delegates of Local 167 required a mar-

[14] Louis Weidberg, who managed the association, was a director of the Chamber of Commerce and in 1927 and 1928 made collections for the Chamber from East Side marketmen. (R. 207, 457.)

ketman to hire additional employees in order to coerce him into adhering to the association. The association continued in existence until a few weeks before the criminal trial started in October, 1929. (Fng. 28, R. 43–44; R. 211–212, 456–458, 600–602.)

The Live Poultry Slaughter House Association, comprising most of the marketmen of the metropolitan area, was organized on September 8, 1931. (Fng. 37, R. 46; R. 477.) The members of the Slaughter House Association assigned to it 10¢ a coop of the bonus of 35¢ a coop which the New Jersey Coop Company [15] pays marketmen when they return coops in good condition to that company. (*Ibid;* R. 158.) These assignments gave the Slaughter House Association an income averaging approximately $1,400 a week for the ten-week period shown by the record (Ex. 30, R. 802), or at a rate of over $70,000 a year.[16] Some of defendant marketmen who were members of the Slaughter House Association have shown a disposition to use it as an instrumentality for continuing the conspiracy. (Fng. 37, R. 46.)

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[15] This company supplies the coops in which the poultry is put at the railroad terminals and in which it is trucked to the marketmen's places of business. (Fng. 37, R. 46.) The New Jersey Coop Company rents the coops for $1.00 a coop. (Ex. A, R. 886.) The receivers pay this rental charge, but make a deduction therefor in remitting the proceeds of sale to the shippers. (R. 363.)

[16] This is comparable to the income received from the same source by the Chamber of Commerce, amounting to $220,750 in a period of little over three years beginning November 18, 1926, and ending January 9, 1930. (Ex. 25, R. 789–791.)

A second organization formed in the fall of 1931 is the Harlem and Bronx Live Poultry Board of Trade. It included in its membership most of the marketmen doing business in Harlem and the Bronx. With the formation of this organization, the Bronx marketmen increased their prices. One marketman was prevented from obtaining poultry in West Washington Market because he resigned from this organization. (Fng. 38, R. 46–47.)

Between September 19, 1931, and some time in November, 1931, when publicity was given to the fact that trial of the present case would commence on November 16, 1931, marketmen in various sections of New York City concertedly raised their prices.[17] (Fng. 35, R. 45; R. 288–289, 534–535, 555–558, 597–599, 606–607, 611–614, 616–617, 624–626.) Whereas previously they had charged retailers from 3¢ to 5¢ more than they themselves paid receivers, after that date retailers were frequently charged from 8¢ to 12¢ above the prices which the marketmen paid the receivers. (Fng. 35, R. 45; R. 598, 611–612, 616–617, 624–625.) During this period the system of allocating customers was at least partially maintained. Marketmen either refused to sell to retailers who had regularly purchased

[17]Appellants emphasize (brief, pp. 42–43) the conflict in the testimony as to this price rise and the reasons therefor. In three instances of such conflicting testimony the District Court said that it preferred the testimony of the Government's witness to that of defendants' witness. (R. 70, 282, 532, 597, 701, 707, 727.)

from other marketmen, explaining this refusal as caused by a combination among the marketmen, or, if they sold to such retailers, they did so reluctantly. (Fngs. 35–36, R. 45; R. 285–286, 615, 625.) Marketmen admitted that if these sales were discovered the labor unions and other marketmen would give them trouble, and on some occasions regular customers were told that if they bought elsewhere, the profit would revert back to the regular marketman. (Fng. 36, R. 45–46; R. 535, 607, 617.)

There is substantial evidence of direct interference with interstate commerce after August, 1928. In February, March, April and May, 1930, the defendants prevented Aaron Steinberg from purchasing and obtaining delivery of poultry from receivers in West Washington Market and at the railroad terminals in New York and New Jersey, and from Philadelphia, Elizabeth, N.J., and Lincoln, Neb. (Fng. 29, R. 44; R. 186–192; Ex. A, R. 829–835, 839–844, 851, 854–856, 858–859, 892–893.) Defendants, as part of their plan to prevent Steinberg from obtaining poultry, threatened and assaulted one of his employees, caused the destruction of his poultry truck and prevented delivery of coops which he had ordered for the transportation of poultry from a railroad siding to his market. (Fng. 29, R. 44; R. 191, 193–194; Ex. A, R. 835, 851–852.) The District Court found that the marketmen, in refusing to sell Steinberg poultry, cooperated with the defendant labor unions to prevent him

from obtaining poultry.[18] (Fng. 29, R. 44.) The net result was a complete boycott, achieved by means and methods similar to those employed in enforcing the conspiracy prior to the criminal prosecution.

At various times during 1929, 1930 and 1931 the defendants prevented other marketmen from obtaining poultry at West Washington Market, the New York Central terminal, or Newark, N.J. (Fngs. 30–32, R. 44–45.) A marketman was prevented from buying poultry at West Washington Market and at the railroad terminals in New York and New Jersey on repeated occasions during these years and his difficulties appear to have continued during the entire period from March, 1929, to July, 1931. (R. 417–444.)

The fact that marketmen in metropolitan New York have, over a period of years, been parties to combinations in restraint of trade has a bearing upon whether there is a continuing threat of resumption of illegal activity by the defendants, justifying an injunction. *Live Poultry Dealers Protective Association* v. *United States*, 4 F. (2d)

[18]Appellants (brief, p. 35) refer to the fact that Judge Knox in the probation hearings took no action against the defendants upon the basis of Steinberg's testimony. But the District Judge in this case, who was impressed both with Steinberg's truthfulness and with his temperateness, stated, with the authorization of Judge Knox, that the latter had believed Steinberg was telling the truth; in addition, his testimony was largely corroborated. (R. 59–60; Ex. A, R. 839–859.)

840, sustained an injunction *pendente lite* forbidding a combination of New York City marketmen to purchase poultry from receivers at the price fixed each day by a committee of marketmen and to boycott receivers who did not observe the prices thus fixed. In April, 1926, the Supreme Court of Kings County, N.Y., entered an order dissolving the Community Live Poultry Corporation after a jury had found that the corporation substantially controlled the live poultry business in certain sections of New York City and that it prevented competition in the supply and price of poultry. (Ex. 47, R. 807–810.) The corporation represented from 95% to 98% of the marketmen in the section where it operated. (R. 582–583.) The Square Deal Live Poultry Corporation, formed by about 88% of the marketmen in Brownsville, was dissolved in May, 1926, by an order of the same court. (R. 589; Ex. 50, R. 826–828.) In this case the corporation consented to the dissolution proceedings brought by the Attorney General of New York. (Ex. 50, R. 826.)

An intent to restrain interstate commerce being shown, it is enough to justify equitable relief if there be a dangerous probability of future acts of restraint. The Sherman Act "directs itself against that dangerous probability as well as against the completed result." *Bedford Cut Stone Co.* v. *Stone Cutters' Association,* 274 U.S. 37, 55. In considering whether that dangerous probability exists when the defendants appear to have sus-

pended or partially suspended their activity under the conspiracy, the motives leading to such suspension are a relevant consideration.

For more than three years prior to the trial of the present case the defendants were continuously operating under the shadow of criminal and civil proceedings to punish and to enjoin their conspiracy.[19] There was the ever-present danger that overt acts in furtherance of the conspiracy would be used against them in the pending litigation. Under these circumstances, something more substantial than a partial suspension of overt acts is required to show a change in heart and purpose. In *United States* v. *United States Steel Corporation*, 251 U.S. 417, 445, this Court, in denying equitable relief, emphasized that certain price-fixing activities had been abandoned nine months before suit was brought, not "in prophecy of or dread of suit", but "from a conviction of their futility", thus inferentially indicating that a cessation of overt acts because of fear of prosecution is not satisfactory evidence of abandonment of a conspiracy in restraint of trade.

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[19] The criminal case was commenced August 20, 1928; sentences were imposed December 16, 1929; these sentences were affirmed, January 12, 1931; and this Court denied certiorari, April 20, 1931. (R. 939; Ex. 23, R. 779; 47 F. (2d) 156; 283 U.S. 837.) The present equity case, which started February 7, 1930, within two months after the criminal sentences had been imposed, came on for trial November 16, 1931. (R. 126, 130.)

When the defendants in an equity proceeding under the Sherman Act, after suit has been filed, voluntarily dissolve the association through the medium of which their restraint was effected, this does not show that they have abandoned their illegal purpose and does not extinguish rights which the Government is asserting "as a substantial trustee for the public under the act of Congress", and the case does not become moot. *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 307–310. The essence of a conspiracy in restraint of interstate commerce is the illegal design and purpose, not the particular instrumentalities employed. In the present case the District Court said (R. 54):

> There were three groups—the two unions and the market men. It matters not whether from time to time the form in which those groups organized themselves may or may not have changed. It matters not if from time to time the personnel of those whose activities are disclosed may or may not have shifted. * * *

It should be noted that the Federal Trade Commission may enter a cease and desist order although the unfair methods of competition against which the order is directed were discontinued before the Commission filed its complaint. *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 Fed. 853, 859–860 (C.C.A. 2d); *Moir* v. *Federal Trade Commission,* 12 F. (2d) 22, 27 (C.C.A. 1st); *Arkan-*

sas Wholesale Grocers' Assn. v. *Federal Trade Commission,* 18 F. (2d) 866, 871 (C.C.A. 8th), certiorari denied, 275 U.S. 533.

III

THE DISTRICT COURT PROPERLY STRUCK OUT AS SHAM THE CONVICTED DEFENDANTS' DENIAL OF THE CONSPIRACY

The first 23 paragraphs of the amended petition describe the identical conspiracy described in the first 23 paragraphs of the indictment in the criminal case. (R. 30, 939.) The District Court, upon motion of the Government, struck out as sham that portion of the answers of the convicted defendants which denied the allegations contained in the first 23 paragraphs of the amended petition. (R. 29–30.) Appellants assign this ruling as error.[20]

The principle of *res judicata* is designed to prevent parties from harassing each other with unnecessary litigation and wasting the time of the courts. Adjudicated questions cannot be relitigated in a subsequent suit between the same parties "whether the second suit be for the same or a different cause of action." *Oklahoma* v. *Texas,* 256 U.S. 70, 85. To the same effect, see *Johnson Co.* v. *Wharton,* 152 U.S. 252.

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[20] Appellants Markman, Rosenman and Weiner were not convicted in the criminal case (*supra*, p. 8) and are not included in the District Court's order to strike. (R. 29.) The Government concedes that an order to strike was entered in the case of appellant Arthur Herbert although this is not shown by the record before this Court (R. 29).

In the present case the convicted defendants had been found guilty beyond a reasonable doubt of the conspiracy charged in the amended petition. Since this conviction required a higher degree of proof than a decree in the present cause requires, the jury verdict conclusively establishes, in a subsequent equity case brought by the Government alleging the same conspiracy, that the convicted defendants had committed the offense charged against them. *Farley, State Commissioner of Excise* v. *Patterson,* 166 App. Div. (N.Y.) 358; *In re Gottesfeld,* 245 Pa. 314.

The primary purpose of pleadings is to define and narrow the issues to be litigated at the trial. Pleadings which do not perform this function are objectionable and may be stricken out or treated as a nullity. *Peacock* v. *United States,* 125 Fed. 583 (C.C.A., 9th). It is a corollary of this rule that a party cannot plead what he cannot lawfully prove. *Hubbard* v. *Lowe,* 226 Fed. 135, 139 (S.D.N.Y.).

Courts take judicial notice of their own records (*United States* v. *California Cooperative Canneries,* 279 U.S. 553, 555), and allegations contrary to facts of which the court takes judicial notice may be treated as a nullity or stricken out (*French* v. *Senate of State of California,* 146 Cal. 604; *Martin* v. *Kennecott Copper Corp.,* 252 Fed. 207 (W.D.Wash.)). The District Court, by looking at its own records, ascertained that certain defendants had been adjudicated guilty of the conspiracy

charged in the amended petition. The denial of this adjudicated fact was a sham and the proper remedy was a motion to strike the denial.[21]

The District Court struck out the convicted defendants' denial of the allegations of the petition setting forth the means and methods used in effecting the conspiracy, not upon the ground that the facts therein alleged had been adjudicated against them, but upon the ground that the only allegations of the petition material as to these defendants were those setting forth continuance of the conspiracy after August 20, 1928. The District Court did not strike out the convicted defendants' denial of the latter allegations.

In any event, the convicted defendants were not prejudiced by the action of the District Court in striking a portion of their answers. The conspiracy was independently established as against the nonconvicted defendants. The Government concedes that the court, in framing a decree, must look solely to the proof in this cause and to the inferences properly to be drawn therefrom. The District Court's ruling did not bar the convicted defendants from introducing evidence to controvert that offered by the Government upon any issue

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[21] For Federal decisions sustaining the power of the court to strike out part of an answer as sham, see *Liebling* v. *Barbara B. & D. Corp.*, 52 F. (2d) 183 (S.D.Fla.); *Banco Nacional Ultramarino* v. *Newton*, 278 Fed. 207 (E.D. N.Y.); *Washington-Alaska Bank* v. *Stewart*, 184 Fed. 673 (C.C.A. 9th); *Peacock* v. *United States*, 125 Fed. 583 (C.C.A. 9th), *supra*.

material as to them, and at the trial no evidence was in fact excluded upon the ground that it was barred by the court's ruling.[22]

The power to strike out a pleading or part of a pleading as sham is not dependent upon express authorization by statute or rule of court; it is a power inherent in the court to prevent a misuse of judicial process. See *Lawrance* v. *Norreys*, 15 App. Cases, 210, 219, and cases cited in footnote 21 (*supra*, p. 49).

IV

THE PROVISIONS OF THE DECREE ARE DESIGNED TO GIVE EFFECTIVE RELIEF AND SHOULD NOT BE MODIFIED

Appellants contend (brief, p. 52) that interstate commerce ceased with the sale and delivery of poultry to marketmen and that therefore the injunction "should have been limited to acts and conduct of the defendants only in so far as the same restrained commerce to this point."

It is clear that intrastate acts may be enjoined when this prohibition is necessary or appropriate to give effective relief against a combination in restraint of interstate commerce. *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U.S. 37, 46–47, *supra*. In *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 438–439 this Court said:

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[22] The District Court permitted Government witnesses to be cross-examined upon their testimony as to incidents prior to August, 1928. (R. 149–151, 165, 216–218, 315, 317–322, 460, 472.) The testimony of many Government witnesses at the criminal trial was introduced by stipulation and the stipulations include the cross-examination of these witnesses.

> To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.

The District Court enjoined the refusal, under defined circumstances, to load, unload, handle or slaughter poultry. (R. 80.) The justification for these injunctive provisions is that it was chiefly by means of such so-called intrastate acts and conduct that the conspiracy was enforced. Appellants have not attempted to show that the conspiracy was not enforced by these means; their sole contention appears to be that, as a rule of law, the court in a Sherman Act proceeding has no power to enjoin intrastate acts. We submit that the power of the court is not so limited, that the proper test is not whether the acts enjoined are, considered by themselves, intrastate or interstate, but whether such acts have been used and are likely to be again used to effect a restraint of interstate commerce. Furthermore, in considering whether particular remedies are necessary or appropriate for efficacious relief, doubt is to be resolved against the defendants. In *Warner & Co.* v. *Lilly & Co.*, 265 U.S. 526, 532, the Court said:

> But respondent being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which has shown by its conduct that it is not to be trusted.

The District Court, which heard and saw the witnesses, was in a better position than is this Court to appraise the nature and extent of the relief which should be granted. The court in its opinion said that, in view of the failure of previous efforts by the State and Federal governments to deal with the same situation and in view of defendants' misunderstanding of the leniency in the criminal case, an effective decree ought to be entered "so that the court may at least thereby make an effort to bring the defendants to a course of conduct that is in harmony with the law." (R. 72–73.) We submit that it did not overstep the limits of its discretionary power in extending the prohibitions of the injunction beyond the point where poultry reaches the marketmen. The reasons for not thus limiting the prohibitions of the decree are stated in the "Comments on Decree" which the District Court filed when it signed the decree. It said (R. 82):

> As pointed out at the trial, in my statement of the grounds for my decision, the condemned conspiracy embraced intrastate as well as interstate commerce. It was only by comprehending both types of commerce in a single plan that its unlawful purpose could be accomplished. When the conspirators, in violation of the Sherman Act, trespassed into the Federal field, the Government became entitled to the assistance of this court in an effort to prevent restraint of interstate commerce. Upon the facts as they have been demonstrated, the attempt to re-

establish freedom of interstate commerce from restraint would be futile if intrastate commerce were omitted from the decree.

Appellants (brief, p. 51) also attack paragraph (1) of the decree, which prohibits use of the offices or positions of the defendant unions for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers. Appellants contend that there is no evidence that the defendants had employed or had threatened coercion of this character. We submit that there was evidence from which the District Court might infer that union delegates had, as a part of the conspiracy, used coercive methods to compel marketmen to use the coops of the New Jersey Coop Company.

The New Jersey Coop Company has a complete monopoly of the business of supplying coops for transporting poultry from the railroad terminals and from West Washington Market to the various markets in New York City. (Ex. A, R. 886.) The monopoly appears to be extremely lucrative. The New Jersey Coop Company receives a net rental of 65¢ each time its coops are used, but there was evidence that coops could be bought for $1.65 a coop and used 20 or 30 times. (R. 158; Ex. A, R. 832, 833, 886.) When coops which a marketman had purchased from a box company in Newark arrived at the marketman's place of business, a delegate of the Shochtim Union and two delegates of Local 167 prevented their delivery. (Ex. A,

R. 833, 851.) The evidence indicates that a short time before this incident the New Jersey Coop Company had asked this marketman to pay the exorbitant rental of $1.65 a coop, and had ultimately refused to let him have coops because he did not have union men. (Ex. A, R. 832–833.)

Other incidents and circumstances indicate a close relationship between the New Jersey Coop Company and the defendant unions and marketmen (when both of the latter groups were engaged in a common conspiracy), and support the inference that the unions were helping to enforce the Coop Company's monopoly. Thus, the manager of the Coop Company, after undertaking to arbitrate a dispute between Steinberg and the defendant unions, personally guaranteed that the unions would carry out any agreement which they made. (Ex. A, R. 884–885.) After a union delegate had told Steinberg that it was possible for him to employ only two members of Local 167 and one shochet, as Steinberg wished, the manager of the Coop Company rejected a settlement on this basis. (R. 200.) The Coop Company's close relationship with the defendant marketmen is shown by the fact that it was the instrumentality through which the Chamber of Commerce and a later organization of marketmen collected dues from their members amounting to about $70,000 a year. (R. 158; Ex. 25, R. 789–791; Ex. 30, R. 802.) This relationship is further shown by the fact that at least one of the defendant marketmen convicted in the criminal case

borrowed from the Coop Company the money to pay his fine. (R. 688.)

V

THE DECREE WAS PROPERLY ENTERED AGAINST APPELLANTS MARKMAN, ROSENMAN, AND WEINER

Appellants raise a question as to the sufficiency of the evidence connecting Morris Markman, Joseph Rosenman and Joseph Weiner with the conspiracy. The District Court said that of the non-convicted defendants the one whose case gave him the most trouble was Joseph Rosenman. (R. 63.) This defendant is secretary of the Shochtim Union. (R. ~~84~~ 506.) Louis Weidberg, who collected for the Chamber of Commerce from the East Side marketmen, paid this defendant $100 a week.[23] (R. 207, 210; Ex. 21, R. 764–767.) Another witness testified that in July, 1927, when he wanted a shochet, he was told by Rosenman to see Benjamin Simon,[24] the Supervisor of the Chamber of Commerce "and if he says we could give you a shochet we will give you one." (R. 449.) At a later time the same witness went to the Shochtim office and was again told by Rosenman to go to Benjamin Simon and if the latter said that the wit-

[23] Compare the payments of $75 a week made by each district to Shapiro, president of the Shochtim Union, in order that "Shapiro should do whatever he is asked to do." (R. 23, 145.)

[24] The District Court said, "From the state in which the proof is left, there is inescapable the suspicion that Benjamin Simon was nothing but a nefarious grafter." (R. 66.)

ness should have a shochet, he would be given one. (R. 454.) A shochet testified that in 1928 he was without a job until he was able to approach Benjamin Simon, when the latter forced the president and secretary (Rosenman) of the Shochtim Union to give him a job. (R. 500.) Rosenman, when he then gave the shochet a card, said to him, "Do not ask any questions, but as long as you slaughter for even one butcher you will be taken away from your job." (*Ibid.*) About a week after the criminal trial, where this testimony was given, Rosenman threatened to punch this witness for having testified against him. (R. 499, 505.)

We submit that the foregoing evidence sufficiently connects Joseph Rosenman with the conspiracy. The only evidence in the record of the detailed payments made from funds collected from marketmen shows weekly payments to this defendant; he took orders in union matters from the supervisor of the Chamber of Commerce; he sat in court throughout the trial but did not testify (R. 64).

We submit that Joseph Weiner, a delegate of the Shochtim Union (R. 256), is also shown to be implicated in the conspiracy. At a time when Mack Harnett could not get poultry Weiner told him to take four members of Local 167 and two shochtim (R. 310–311), and the circumstances show that the union demand that Harnett employ this number of union men was a form of coercion to compel him to abide by the conspiracy. Weiner's

conversation with Harnett took place after Charles and Arthur Herbert, delegates respectively of Local 167 and the Shochtim Union, had walked into Harnett's place of business and ordered his union men out on a false charge of violating union rules the day after the president of the Chamber of Commerce had accused Harnett of selling to strange customers. (R. 301–302, 305.) Following this occurrence, Harnett could not obtain poultry at West Washington Market, the New York Central terminal or the New Jersey terminals, but as soon as Harnett had agreed with the president of the Chamber not to sell wholesale, i.e., as a marketman, he was able to purchase poultry. (R. 302–303, 308.) That Weiner's demand that Harnett employ two shochtim and four members of Local 167 was not incident to a mere labor dispute is also shown by the fact that prior to the time that Harnett's men were called out by the union delegates, he had employed, without objection by Weiner, one member of the Shochtim Union and one member of Local 167, and he did not need in his business more than this number of employees. (R. 311.)

Weiner was on the pay roll of the Chamber of Commerce two or three weeks in the summer of 1927 at $75 a week. (R. 152.) The witness first said that Weiner had no duties to perform while so employed; he later said that Weiner was employed (although a union delegate) to represent marketmen in a controversy with the union. (R. 152, 165.)

In addition, there is the testimony of Barney Hecht connecting Weiner with various aspects of the controversy.[25] (R. 400, 416, 417.) While the District Court called this witness scatterbrained, exaggerated, and vague, it also believed he was telling the truth. (R. 68.) He testified that in March, 1929, the Supervisor of the Chamber of Commerce told him that he could not get poultry unless he paid the Chamber $50 a week; that he would have to do whatever the "gangsters" said; that Joseph Weiner was one of the three gangsters named. (R. 421.)

The third appellant as to whom a question of the sufficiency of the evidence is raised is Morris Markman. Both in the petition and in the decree he is listed among the defendants as "Morris Markman (alias 'Nigger')", no other defendant having a similar alias. (R. 7–8, 77.) In the criminal case this same individual was indicted as "Joe Goldman (alias 'Nigger')". (Ex. 7[26], pp. 24, 585, 629.)

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[25] On one occasion during the trial this witness identified another defendant as being Joseph Weiner, but he later identified defendant Weiner as one of the men who had picketed his place. (R. 416, 417.)

[26] By stipulation, this exhibit, which is the record on appeal to the Circuit Court of Appeals in the criminal case, is not printed as part of the present record but may be referred to in argument before this Court. (R. 940.) The exhibit was admitted in evidence for the limited purpose of supplementing the judgment roll in the criminal case by way of identification or elaboration of the issues there involved. (R. 754.)

Certain testimony given by Barney Hecht at the criminal trial was received in evidence in this case. (R. 400.) Hecht there testified that when he went to the New York Central terminal to get poultry, "Nigger" Goldman (whom he identified as defendant Goldman) came up and said, "Don't go in the yard, you are on the blacklist, you can't get any poultry"; that Goldman told him to go and see Benjamin Simon (supervisor of the Chamber of Commerce) or Tootsie Herbert (a delegate of Local 167). (R. 403.) Hecht also testified that on the preceding day a man named "Nigger" at the New York Central terminal had told Hecht that he was on the blacklist; that he could not get any more poultry; that he had better see Simon or Tootsie Herbert, who would tell him whether or not he could get poultry. (R. 402.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933